

IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI,	)	
	)	
	)	
	)	
vs.	)	No. SC 84689
	)	
DEDRIC RASH,	)	
	)	
	)	
	)	
	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI  
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION ELEVEN  
THE HONORABLE EMMETT M. O'BRIEN, JUDGE

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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### **JURISDICTIONAL STATEMENT**

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original substitute brief.

### **STATEMENT OF FACTS**

Appellant adopts and incorporates by reference the Statement of Facts from his original substitute brief.

### **POINT RELIED ON**

**The trial court erred in sustaining the state's motion and refusing to permit defense counsel to make an opening statement outlining for the jury the factual evidence that would be elicited from the state's witnesses, because this ruling violated appellant's rights to due process and to present a defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that defense counsel was thereby unable to inform the jury of the nature of the defense so as to enable the jurors to appreciate the significance of the evidence as it was presented, and there were facts elicited in cross-examination that tended to show that Sarah Kaufman's identification of appellant may have been mistaken.**

*State v. Thompson*, 68 S.W.3d 393 (Mo. banc 2002);

*State v. Taylor*, 929 S.W.2d 925 (Mo. App., S.D. 2996);

U.S. Const., Amends. V, VI and XIV; and

Mo. Const., Art. I, Secs. 10 and 18(a).

## **ARGUMENT**

**The trial court erred in sustaining the state's motion and refusing to permit defense counsel to make an opening statement outlining for the jury the factual evidence that would be elicited from the state's witnesses, because this ruling violated appellant's rights to due process and to present a defense, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that defense counsel was thereby unable to inform the jury of the nature of the defense so as to enable the jurors to appreciate the significance of the evidence as it was presented, and there were facts elicited in cross-examination that tended to show that Sarah Kaufman's identification of appellant may have been mistaken.**

As respondent recognizes, this issue is governed by this Court's opinion in *State v. Thompson*, 68 S.W.3d 393 (Mo. banc 2002). Respondent's argument focuses on its contention that the issue is unpreserved, and can be reviewed only for plain error. Respondent is incorrect.

### **Respondent argues defense counsel was not precluded from making an opening statement**

Respondent argues that in order to preserve the issue for review, defense counsel was bound to make *some* sort of opening statement, rather than reserve her

opening statement (Resp. Br. 13). However, the trial court's ruling had prevented her from telling the jury the facts she would elicit from the cross-examination of the state's witnesses (Tr. 27-30). The most defense counsel could have said is something like, "listen to all the evidence before you make your decision," as some defense attorneys do. What more does that add to preserve the issue that counsel was not allowed to make an opening statement of facts to be elicited in cross-examination?

In fact, defense counsel did all she could do to preserve the issue, without actually acting in contravention of the trial court's ruling. As more fully discussed in appellant's opening brief, this is not required. *State v. Taylor*, 929 S.W.2d 925, 927 (Mo. App., S.D. 2996).

### **Respondent argues offer of proof inadequate**

Respondent takes defense counsel to task for the length of her verbal offer of proof to the trial court. Respondent also quarrels with appellant's list of facts which were elicited on cross-examination of the state's witnesses (Resp. Br. 16). The State counts the pages of cross-examination in the transcript and divides by the number of pages in the offer of proof (Resp. Br. 15-16). This is an interesting analysis, but appellant does not pretend to understand how respondent's mathematics renders this issue unpreserved.

Respondent has confused *preservation* with *prejudice*. Defense counsel was not required to tell the trial court every word that would come out of every

witness' mouth in order to preserve this issue for review. And that does not prevent this Court from reviewing the entire transcript for the prejudice resulting from this error.

Appellant respectfully requests that this Court reverse his convictions and remand for a new trial.



## **CONCLUSION**

For the reasons presented, appellant respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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### **Certificate of Compliance and Service**

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 800 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in October, 2002. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 10<sup>th</sup> day of October, 2002, to Mr. Joel A. Block, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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